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No. 92-344

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,
Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, TRANSAFRICA, AND THE CONGRESSIONAL BLACK CAUCUS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether Executive Order No. 12,807, which was issued by the President on May 24, 1992, to authorize the United States Coast Guard to interdict Haitians on the high seas and repatriate them forcibly and without process to Haiti solely because they are Haitian, constitutes impermissible national origin discrimination in violation of the Equal Protection Clause of the United States Constitution.

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INTERESTS OF THE *AMICI CURIAE*

The National Association for the Advancement of Colored People (NAACP) is a nonpartisan membership organization dedicated to promoting equality of rights, eradicating racial prejudice, and protecting African-Americans under the Constitution through principles of equal justice under law. The NAACP has a strong interest in human rights and equality in the United States, Haiti, and abroad. Its legal advocacy is designed to ensure the political, educational, social, and economic equality of minority group citizens; to achieve equality

of rights and eliminate racial prejudice; and to remove barriers of racial discrimination through legislation, litigation, and advocacy. The NAACP has sought enactment and enforcement of federal, state, and local laws securing civil and constitutional rights.

The NAACP has an unrelenting history as an advocate for human rights and equality in Haiti, having maintained a long-standing interest in Haitian affairs dating back to the administration of President Woodrow Wilson. NAACP involvement has included:

- Sending a mission to Haiti in 1920 after the United States seized control of the country—ostensibly to establish and maintain order—because of its concern over a Marine report indicating that more than 3,000 Haitians were killed by American forces.
- Conducting a fact-finding mission in Haiti in 1920 by Assistant Secretary of the NAACP, James Weldon Johnson, which was instrumental in getting President Warren G. Harding to conduct a Senate investigation of the situation in Haiti.
- Relentlessly pressing for restoration of Haitian sovereignty, which resulted in the 1933 Agreement for the removal of American forces.
- Advocating the passage of emergency legislation to block the forced repatriation of thousands of Haitian refugees in 1991-92.
- Calling on President George Bush to stop the repatriation of Haitians and to resolve the plight of Haitian refugees by according them Temporary Protective Status.
- Leading a delegation in January 1992 to the camp established for refugees at the Guantanamo Naval Base in Cuba to deliver humanitarian aid, clothing, and other personal items.
- Filing an *amicus* brief in support of plaintiffs in *Haitian Refugee Center v. Baker*, 953 F.2d 1498 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992), which sought to enjoin the forced repatriation of Haitian refugees.

The Congressional Black Caucus (CBC) was founded in 1970 by thirteen black members of the United States House of Representatives to assure that the interests of black and minority Americans would be heard, and to influence legislative policies touching all aspects of America and the struggles of people of color throughout the world. In the 102nd Congress there were twenty-six members of the CBC who were vitally involved at the federal level—with both the legislative and executive branches—on matters relating to the immigration of Haitians.

Historically, the CBC has been and continues to be concerned with the inequity in immigration and foreign policy directives of the United States as it pertains to Haitian refugees and the governance of Haiti. The CBC has intervened directly, in consultation with deposed Haitian President Jean-Bertrand Aristide, to seek resolution of the continuing failure to recognize Haiti's democratically elected government. The forty members of the CBC who will be sworn in for the 103rd Congress view the pursuit of an immediate and equitable resolution of the Haitian immigration crisis as a moral imperative.

TransAfrica, the African-American foreign policy lobby for Africa and the Caribbean, has a long-standing interest in Haiti. Since its establishment in 1977, TransAfrica has monitored numerous political developments in the Caribbean and offered recommendations on United States foreign policy initiatives as they affect the region. Recently, TransAfrica has put a special focus on the plight of Haitians and their struggle to achieve democracy and respect for human rights. TransAfrica has collaborated in the past with other organizations—including the NAACP—in efforts to encourage an enlightened United States policy toward Haitian refugees.

Because petitioners' actions with respect to Haitian refugees test the parameters of constitutionally protected civil and human rights, *amici* submit this brief to assist the Court in its resolution of this case.[1]

SUMMARY OF THE ARGUMENT

As respondents demonstrate in their brief on the merits, the court below correctly concluded that President Bush's May 24, 1992 Order (the Kennebunkport Order), and petitioners' actions in implementing it, violate the express terms of Section 243(h)(1) of the Immigration and Nationality Act. *Amici* submit that the court of appeals' decision was correct in this regard and should be affirmed. We file this brief separately to urge an alternative ground for affirmance—*viz.*, that petitioners' execution of the Kennebunkport Order is also violative of the Equal Protection Clause of the United States Constitution. For even if petitioners prevail in their arguments regarding the territorial reach of Section 243(h)(1), they are still not exempt from the fundamental limits on governmental conduct imposed by the Constitution. Petitioners' interception of fleeing Haitian refugees on the high seas to return them, forcibly and without process, to their persecutors is the very sort of invidious discrimination based on national origin that the Equal Protection Clause was intended to eradicate.

A. Congress enacted the Refugee Act of 1980 to regularize the admission of aliens fleeing persecution and to limit executive discretion to dispense political asylum. To this end, Congress expressly removed from the United States' refugee program all ideological and geographic prejudices, and mandated that *all aliens*, regardless of race, religion, or national origin, shall have an equal opportunity to petition the United States Government for asylum. The Act thus explicitly *requires* the Executive

[1] The parties' letters of consent have been filed with the Court pursuant to Rule 37.3.

Branch to implement the asylum program in a nondiscriminatory manner.

The Kennebunkport Order does just the opposite: it establishes a two-track system that treats aliens fleeing their countries radically differently based on *nothing more than* their national origin. Thus, non-Haitians are afforded all the protections guaranteed by Congress in the Refugee Act: they may come to this country to apply for asylum and are given the right to present their cases to an impartial asylum officer, to be represented by counsel, to create an evidentiary record in support of their claims, and to obtain judicial review of the administrative asylum determination. In addition, non-Haitians who qualify as refugees have an absolute right not to be returned to their persecutors.

By contrast, Haitian applicants, like respondents, are denied *all* such protections. They are summarily interdicted at sea and repatriated to Haiti, where many "face political persecution and even death," without being given any opportunity whatsoever to present their asylum claims. *Haitian Centers Council, Inc. v. McNary*, No. 92-CV-1258, slip op. at 11 (E.D.N.Y. April 7, 1992), *aff'd*, 969 F.2d 1326 (2d Cir. 1992). And, notwithstanding the undisputed historical fact that as many as one third of these refugees have *bona fide* asylum claims, petitioners' interdiction program refuses to even entertain these claims because they are asserted by persons who happen to be Haitian.

B. This separate and unequal asylum program for Haitians violates not only Section 243(h)(1) of the Refugee Act of 1980, but also the Equal Protection Clause of the United States Constitution. Respondents have a constitutionally protected interest, conferred upon them by Congress, to make a meaningful application for political asylum. The Executive's denial of this right to respondents *merely because they are Haitian* creates a constitutionally impermissible distinction based on national origin.

This is particularly true where, as here, Congress—pursuant to its plenary authority over immigration matters—has clearly directed that applications for asylum be considered in a nondiscriminatory fashion.

That petitioners' discrimination against Haitians takes place on the high seas, rather than on United States soil, is of no constitutional consequence. Even were this Court to conclude that Section 243(h)(1) of the Act does not extend to aliens at sea—as it plainly does by its terms—this would not relieve petitioners of their obligation to afford Haitians over whom they forcibly take custody the equal protection of the laws. This is because these obligations flow not only from the Act, but from constitutional limits on governmental power. Once petitioners reach out and take Haitians into their custody—whether on United States soil or at sea—such aliens are within the jurisdiction of the United States even if outside its territory. Petitioners have a duty to afford aliens in such circumstances minimal constitutional protections. To permit petitioners to frustrate the neutral asylum program mandated by Congress by taking extraordinary measures to ensure that no Haitian is even physically able to make an application for asylum would make a mockery of the fundamental principles at the core of the Equal Protection Clause.

ARGUMENT

PETITIONERS' SEPARATE AND UNEQUAL ASYLUM PROGRAM FOR HAITIANS VIOLATES THE EQUAL PROTECTION CLAUSE.

A. The Executive Branch Has Created A Separate And Unequal Asylum Program For Haitians.

Congress enacted the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980)—which created the United States political asylum program—specifically to regularize the asylum application process for aliens fleeing persecution and to limit executive discretion in granting asylum. The impetus behind the program was Congress's frustration with the racial, ethnic, ideological, and geographical biases that historically have tainted grants and denials of asylum.[2] Thus, in the exercise of its plenary power over immigration matters, Congress established an asylum program that was to be blind to such factors as an alien's race or nationality.

In enacting a nondiscriminatory asylum program, Congress not only intended that the political asylum program be open to all aliens, but expressly contemplated that Haitians would be beneficiaries of the program. As Representative Shirley Chisholm explained:

> With respect to the problem of the Haitians, this bill sets up for the first time in the country's history a statutory procedure for asylum. Whether any particular Haitian will qualify under the law is a matter to be determined by the Attorney General under appropriate regulation.

[2] *See* S. Rep. No. 256, 96th Cong., 2d Sess. 4 (1979) (definition of refugee "eliminates the geographical and ideological restrictions" in preexisting law and policy); 126 Cong. Rec. 4,507-08 (1980) (statement of Rep. Chisholm) (refugee admissions should "not be tainted with ideological, geographical or racial or ethnic biases," and "refugees fleeing persecution regardless of the country they come from, on humanitarian considerations alone, should be equal in standing for entry into the United States").

126 Cong. Rec. 4,507 (1980). There is therefore no question that respondents here were among the persons Congress sought to protect under the Act.

Notwithstanding Congress's mandate that all aliens applying for asylum receive equal treatment, since President Bush's issuance of the Kennebunkport Order on May 24, 1992 (Executive Order No. 12,807, 57 Fed. Reg. 23,133 (1992)), petitioners have implemented a two-track asylum program—one for Haitians and another for non-Haitians. The asylum program for non-Haitians encompasses the panoply of procedural and substantive protections Congress mandated in the Act. Thus, the non-Haitian asylum applicant is entitled to and receives an initial "nonadversarial" interview with an asylum officer, at which the applicant may be represented by counsel and present affidavits of witnesses. 8 C.F.R. § 208.9(b) (1992). In addition, at the interview, the applicant or the applicant's attorney may make a statement or comment on the evidence. *Id.* The applicant is then given a period of time to supplement the record supporting his or her application. *Id.*

If the asylum officer makes an initial determination that the applicant's claim will be denied, the officer must notify the applicant of the intent to deny. *Id.* at § 208.17. The applicant is then entitled to *de novo* review of his or her claim in an exclusion or deportation proceeding (*id.* at § 208.2(b)), and judicial review after all administrative remedies have been exhausted. 8 U.S.C. § 1105a(c) (1988). If it is determined through these administrative and judicial proceedings that an alien qualifies for refugee status—*i.e.*, "that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group or political opinion"—the Attorney General is prohibited from deporting or returning the alien to the country from where the alien is seeking asylum. *Id.* at § 1253(h).

If the alien is Haitian, however, the process is very different. The Haitian alien—*because she is Haitian*—is

prevented from ever making an asylum application.[3] Under the Kennebunkport Order, she is forcibly interdicted at sea and summarily returned to Haiti without ever being given a meaningful opportunity to establish that she legitimately fears for her life or safety on account of her political opinions. Unlike her non-Haitian counterpart, she is denied the right to be interviewed, to present evidence on her behalf, to be represented by counsel or to have any asylum determination made reviewed by a court. Instead, she is effectively rounded up and handed over by the United States Government directly to her persecutors.

There is ample evidence to suggest that a sizeable number of the interdicted Haitians would have viable claims of asylum were they permitted to present them. Just days before the interdiction program for Haitians began, asylum officers were "screening in" 30 percent of all Haitians making applications for asylum on the ground that they had credible fears of persecution in Haiti. *See*

[3] It is undisputed that the classification scheme adopted by the Kennebunkport Order is based exclusively on national origin. Although the Order itself does not single out Haitians by name, petitioners do not contest that it was expressly directed at the "Haitian problem." In fact, just one day after the Order was signed by President Bush, the White House Press Secretary issued a statement acknowledging that the President had "'issued an executive order which will permit the U.S. Coast Guard to begin return of Haitians picked up at sea directly to Haiti.'" *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1350, 1353 (2d Cir. 1992).

Even were it not plain that the Kennebunkport Order was premised on a national origin classification, the mere fact that an order appears facially neutral will not save it from constitutional scrutiny. As this Court explained in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886):

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Id. at 373-74.

J.A. filed in Court of Appeals at 429. Petitioners' new interdiction program, however, takes no account of these facts. Nor do petitioners suggest that the political climate in Haiti has changed. Pursuant to this program, more than 3,000 Haitians have been forcibly repatriated wholly without regard to the legitimacy of their fears of political persecution.

Petitioners attempt to mute the vast differences between the asylum tracks for Haitians and non-Haitians by pointing to the fact that, under the Order, (1) Coast Guard officers are "permitted" to interview Haitians interdicted at sea, and (2) Haitians may apply for refugee status at the United States Embassy in Haiti under the "overseas refugee program." These are, however, empty protections and certainly do not rise to the level of the extensive procedural protections afforded under the program for non-Haitian asylum applicants.

First, while commanding officers of Coast Guard vessels may be permitted to interview and grant temporary refuge to interdictees in immediate and exceptionally grave physical danger, petitioners have not identified a single instance where such an interview has taken place, and *amici* are unaware of any. Moreover, it is unlikely that Coast Guard commanders have the time, the expertise, or the training required to conduct asylum interviews.

Second, it is simply not a viable option for Haitians to apply for asylum at the United States Embassy in downtown Port-au-Prince, where they run the risk that their actions are being watched by the very persons from whom they are trying to escape persecution. And, this option is even less viable for those Haitians who were interdicted at sea and returned to Haiti by the Coast Guard since, upon their return, the cutter's manifest with the interdictees' identities is handed over to the Haitian police. J.A. filed in Court of Appeals at 413-27. The Haitian Government has recently warned that those

who attempt to flee Haiti will be punished. *Haiti Warns Potential Boat People Against Flight*, Reuters, Nov. 19, 1992.[4]

While the starkness of the separate and unequal treatment of Haitians under the Kennebunkport Order should be conclusive, an extensive prior history of systematic discrimination against Haitians seeking to immigrate to this country only underscores that underlying the Order is an impermissible discriminatory purpose. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) ("The historical background of the decision is one evidentiary source [which helps to establish intent], particularly if it reveals a series of official actions taken for invidious purposes.").

As far back as the 1970s the INS in Florida established a separate "Haitian Program" to dispose of a backlog of asylum claims that had been filed by Haitians who had fled the barbaric Duvalier regime. The program had a single goal: "to expel Haitian asylum applicants as rapidly as possible." *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 513 (S.D. Fla. 1980), *aff'd on other grounds as modified sub nom. Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982). Under this "program," Haitians, unlike other applicants for asylum, were not afforded a suspension of deportation proceedings while their asylum applications were being considered, nor were they permitted the standard ten-day period

[4] Furthermore, the "overseas refugee program" in place at the Embassy offers none of the procedural safeguards available to those persons permitted to apply for asylum in the United States. 8 U.S.C. § 1157. Under this program, the applicant is not entitled to counsel at the screening interview, has no rights regarding supplementation of the record, and must have a "sponsor" who guarantees transportation to the United States for the applicant if the application is granted. In addition, there are several mandatory grounds for exclusion that are not applicable to those individuals applying under the political asylum program. *See* 8 C.F.R. §§ 207.1 *et seq.*

within which to perfect their applications for withholding of deportation. These procedures were " 'suspended insofar as Haitians [were] concerned.' " *Id.* at 513 (citation omitted). And, Haitians who asserted their fifth amendment right to remain silent during questioning about their alien status were "threatened, coerced and penalized." The end result was the denial of *every* asylum application filed by a Haitian over an eight-month period. The district court reviewing this "Haitian Program" concluded:

> The Haitians allege that the actions of INS constitute impermissible discrimination on the basis of national origin. They have proven their claim. This Court cannot close its eyes, however, to a possible underlying reason why these plaintiffs have been subject to intentional "national origin" discrimination. The plaintiffs are part of the first substantial flight of *black* refugees from a repressive regime to this country.

Id. at 451.

At one point during the height of the "Haitian problem" in the early 1980s, the INS went so far as to attempt to send Haitian immigrants to West Virginia and Texas (among other places) for processing—where there would be virtually no qualified, Creole-speaking immigration attorneys to assist them in prosecuting their claims. *Louis v. Meissner*, 530 F. Supp. 924 (S.D. Fla. 1981). The goal was to keep to a minimum the number of successful Haitian asylum applicants, and the court found the program was successful: "[B]y transferring these refugees to desolate, remote areas, wholly lacking in counsel, and/or Creole translators, INS has thwarted the statutory and regulatory rights of these refugees to representation in their exclusion proceedings." *Id.*

More recently, of course, the "Haitian problem" has again become a source of trouble to immigration officials, in the aftermath of the September 1991 fall of the

democratic government of Jean-Bertrand Aristide. The number of Haitians fleeing persecution is again on the rise, and again the INS has reacted with "special" Haitian programs. As a precursor to the Kennebunkport Order, a program was implemented whereby the United States Coast Guard would intercept boats coming from Haiti and take the Haitians on board to the United States Naval Base in Guantanamo, Cuba.[5] There the Haitians were incarcerated indefinitely, without access to telephones or legal services, and were not permitted to leave Cuba for any destination other than Haiti. They were subjected to a "pre-screening" program in which those with "credible" fears of persecution were permitted to continue on to the United States to apply for asylum, but those without were forcibly repatriated to Haiti.

Against this background of historic mistreatment of immigrating Haitians, the current program is exposed for what it is: impermissible national origin discrimination violative of the Equal Protection Clause.

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[5] More than a decade ago, a district court predicted the likelihood that the INS would implement such a program:

> [An August 20, 1978 INS memo] also contains a suggestion not previously made. [It] notes the possibility of taking intercepted boatloads of Haitians to Guantanamo Bay instead of to Florida. This proposal could arise from two possible motives. First, it could merely be an attempt to protect Florida from the potential dangers of an immigrant influx. . . . On the other hand, it could be an attempt to isolate the Haitians from the information and aid they would receive in South Florida. In the context of this case, the second motive seems prevalent. As with so many other proposals, this one was directed at Haitians alone. . . . Moreover, as noted above, the actions of lawyers representing Haitians were seen as part of the Haitian problem. By keeping the Haitians out of Miami, the INS could solve that aspect of the problem. Of course, the Haitians might be deprived of some rights as a result; but expulsion, not full consideration, was the goal.

Haitian Refugee Center v. Civiletti, 503 F. Supp. at 515.

B. The Separate And Unequal Asylum Program Violates The Equal Protection Clause.

As noted above, in enacting the Refugee Act of 1980, Congress expressly created a constitutionally protected right for *all* aliens to petition for asylum on an equal basis, and not to be returned to their persecutors if they are refugees. The separate and unequal program implemented by the Kennebunkport Order violates the Equal Protection Clause for the simple reason that it denies Haitians, solely because of their national origin, their right to apply for asylum.

Even were this Court to conclude that, despite the plain reference to "any alien" in Section 243(h)(1), the statute's reach was limited to aliens on United States soil, petitioners' actions still offend the Equal Protection Clause because these constitutional guarantees bind executive officials wherever they may act. Here, petitioners' interdiction efforts—reaching out to intercept all Haitians and forcibly turning them back to the persecution from which they fled—constitute an exercise of sovereign dominion by the United States over respondents. As such, and because this sweeping denial to all Haitians of access to the United States asylum program squarely contradicts Congress's purpose in passing the 1980 Refugee Act, petitioners' actions violate the Equal Protection Clause of the Constitution.

1. *The Kennebunkport Order Violates Respondents' Constitutionally Protected Right To Petition Our Government For Political Asylum.*

As demonstrated in respondents' brief, through the enactment of the Refugee Act of 1980, Congress conferred upon all aliens the right to petition our government for political asylum on an equal basis, irrespective of their national origin. It is axiomatic, of course, that "constitutionally protected liberty or property interests may have their source in positive rules of law creating a substantive entitlement to a particular benefit." *Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984) (citing *Meachum v. Fano*, 427 U.S. 215, 226 (1976)). *See also Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("[A] person's liberty is equally protected, even when the liberty itself is a statutory creation of the State."). In this case, respondents plainly have a liberty interest that warrants Fifth Amendment protection—the statutory right to petition our government for political asylum and for that petition to be considered in a nondiscriminatory manner.

Petitioners' interdiction program robs respondents of this constitutionally protected right to petition for asylum, because, in contrast to similarly situated aliens from other countries who may achieve refugee status based on a well-founded fear of persecution, Haitians are faced with an *irrebuttable presumption* that their asylum claims are meritless and therefore not worthy of consideration. Haitian aliens—solely by virtue of their Haitian nationality—are deprived of the opportunity even to arrive at a United States port of entry to present an application for asylum. Rather, they are physically interdicted at sea and escorted back to Haiti by the United States Coast Guard. This unequal access to the asylum application process is the very type of class-based, invidious discrimination that the Equal Protection Clause—and the Refugee Act which Congress enacted in the exercise of its plenary power over immigration—were intended to prevent.[6]

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[6] *See, e.g., Vigile v. Sava*, 535 F. Supp. 1002, 1016 (S.D.N.Y. 1982) (blanket denial of parole to all Haitians was impermissible discrimination on the basis of race and nationality), *rev'd on other grounds sub nom. Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982); *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 532 (S.D. Fla. 1980) ("The decision was made among high INS officials to expel Haitians, despite whatever claims to asylum individual Haitians might have. . . . This Program, in its planning and executing, is offensive to every notion of constitutional due process and equal protection."), *aff'd on other grounds as modified sub nom. Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

2. *Haitians Interdicted At Sea Are Entitled To Equal Protection Of The Laws.*

Even were this Court to conclude that Section 243 (h)(1) does not as a general matter extend extraterritorially to nonresident aliens, that conclusion would not relieve petitioners from complying with constitutional requirements in their actions towards these respondents. This is because the propriety of applying Equal Protection principles to petitioners' acts on the high seas flows not just from respondents' status, but also from the constitutional limits on governmental power.

This Court has long held that "there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process as guaranteed by the Constitution of the United States." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 (1974) (quoting *Mora v. Mejias*, 206 F.2d 377, 382 (1st Cir. 1953)).[7] The concept of responsible government imposes some minimal constitutional limits on the conduct of executive officials. *See Youngberg v. Romeo*, 457 U.S. 307 (1982); *Revere v. Massachusetts General Hosp.*, 463 U.S. 239, (1983). Thus, for example, the logic of the cases extending constitutional rights to resident aliens rests not simply on an assessment of the *status* of the plaintiff, but also on the requirement that agents of our government may not act arbitrarily. *See, e.g., Plyler v. Doe*, 457 U.S. 202 (1982).

In this case, petitioners should not be permitted to circumvent their obligations under the United States Constitution and the immigration laws of this Nation by systematically interdicting Haitians at sea before they reach a port of entry, where United States law unquestionably controls. Indeed, it is precisely because of such action by the United States government that respondents are unable to reach a port of entry. Once petitioners reach out and take Haitians into their custody—whether at sea or on United States soil—petitioners are obligated to extend to them minimal constitutional protections. *Cf. DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 199-200 (1989) ("[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes on it a corresponding duty to assume some responsibility for his safety and general well-being."). It would be constitutionally anomalous to allow the United States to discriminate against Haitians on account of their national origin at sea in order to avoid its obligation to afford Haitians the right to apply for asylum on a nondiscriminatory basis when they touch United States soil.

Recognizing the potential for such anomalies, members of this Court recently have urged that the reach of constitutional protections should be determined not by simplistic geographic rules, but rather, "by asking whether adherence to a specific constitutional guarantee would be impracticable and anomalous." *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring). Extending Equal Protection rights to respondents would be neither. Quite the contrary, to do so would merely afford Haitians the same statutory and constitutional rights that are already granted to non-Haitians. Indeed, any other result would "fly in the face of this Court's long-held and recently reaffirmed commitment to apply the Constitution's due proces and equal protection guarantees *to all individuals within the reach of our sovereignty.*" *Jean v. Nelson*, 472 U.S. 846, 875 (1985) (Marshall, J., dissenting) (emphasis added) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1986)).

[7] *Cf. Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931) (applying Fifth Amendment Just Compensation Clause to takings claim by extraterritorial alien plaintiff); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1386-88 (10th Cir. 1981) (recognizing that excludable aliens within the custody of the United States prior to entry have substantive and procedural due process rights relating to matters other than their exclusion from the United States).

This conclusion is likewise consistent with those cases in which this Court has held that the laws of the United States govern the conduct of American agents aboard vessels operating under the United States flag. These decisions—applying the flag doctrine—establish that a ship is essentially a floating part of the State whose flag it flies, and therefore the laws of the flag-state apply on board. As the Court explained in *Lauritzen v. Larsen*, 345 U.S. 571 (1953):

> This Court has said that the law of the flag supersedes the territorial principle, even for purposes of criminal jurisdiction of personnel of a merchant ship, because it "is deemed to be a part of the territory of that sovereignty [whose flag it flies], and not to lose that character when in navigable waters within the territorial limits of another sovereignty." (quoting *United States v. Flores*, 289 U.S. 137, 155-59).
>
> Some authorities reject, as a rather mischievous fiction, the doctrine that a ship is constructively a floating part of the flagstate, but apply the law of the flag on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her.

Id. at 585.

Similarly, in this case, the reach of available constitutional protections should, at a minimum, be defined to encompass exercises of sovereign authority and control by United States agents over respondents in international waters. Thus, when petitioners reach out and take Haitians into their custody on United States Coast Guard cutters, petitioners do not obtain limitless power over their captives. The cutters are an extension of the United States—the flag-state—and therefore constitutional and other United States legal principles extend to the cutters. On the cutters, the Haitians are entitled to the same constitutional protections that they would have been afforded on United States soil. Accordingly, petitioners' return of Haitians to Haiti under the Executive Branch's interdiction program—without affording them the opportunity to petition for asylum—deprives them of a substantial liberty interest on account of their national origin, in violation of the Equal Protection Clause.

3. *This Case Is Distinct From The Cases In Which The Court Has Declined To Extend Constitutional Protections To Nonresident Aliens.*

Unlike cases in which the Court has declined to extend constitutional protections to nonresident aliens, respondents' case involves a clear and compelling congressional mandate that a particular program affecting aliens be administered in a nondiscriminatory manner. This case does *not* present a question regarding the appropriate constitutional limits on the power of Congress, in the exercise of its plenary powers over immigration matters, to draw distinctions within or among alien groups. Nor does it present the issue whether the Executive may deny aliens constitutional protections in matters relating to immigration where Congress has delegated legislative authority or has been silent on an issue. Rather, the *sole* issue presented is whether the Executive may, consistent with the dictates of the Equal Protection Clause of the United States Constitution, discriminate on the basis of national origin where Congress *has spoken* by enacting legislation expressly forbidding such discrimination. *Amici* are aware of no case in which this Court has upheld facially discriminatory Executive action that is flatly inconsistent with legislation by Congress in the immigration area.

The presence of congressional legislation expressly forbidding discrimination among different classes of aliens in the asylum application process sets this case apart from the various lines of cases in which the Court has declined to extend to aliens equal protection of the laws

or other constitutional protections. While the Court has permitted Congress "[i]n the exercise of its broad power over naturalization and immigration" to "make[] rules that would be unacceptable if applied to citizens," *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976), those cases are inapposite because here Congress has passed legislation directing that *all* aliens be permitted to apply for asylum on a nondiscriminatory basis.

Moreover, even though this Court has upheld decisions by the Executive to preclude certain aliens from entering the United States without according them any process (*see, e.g., Knauff v. Shaugnessy*, 338 U.S. 537 (1950) (affirming the Attorney General's decision to exclude without a hearing an alien based on his determination that her entry would be prejudicial to the interests of the United States)), those cases predate Congress's enactment of the 1980 Refugee Act. The 1980 Act afforded aliens not only the right to apply for asylum but also a panoply of procedural protections to ensure that that right is not an empty one. And, even the pre-1980 cases acknowledge that due process for an alien is the procedure authorized by Congress. *Id.* at 544.

Finally, while this Court has declined to extend certain constitutional protections to nonresident aliens (*see, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (declining to extend Fourth Amendment to the search and seizure of property in a foreign country belonging to a nonresident alien arrested in the United States)), this Court has never held that nonresident aliens are entitled to *no* constitutional protection at all.[8] "'[T]he question of which specific safeguards . . . are

[8] Although the extension of the Fourth Amendment's warrant requirements to a search and seizure in a foreign country might be "impracticable and anomalous" because of "[t]he absence of local judges or magistrates available to issue warrants" (*Id.* at 278 (Kennedy, J., concurring)), this is not to say that nonresident aliens are entitled to no constitutional protections.

appropriately to be applied in a particular context . . . can be reduced to the issue of what process is 'due' . . . in the particular circumstances of a particular case.'" *Id.* at 278 (Kennedy, J., concurring) (quoting *Reid v. Covert*, 354 U.S. 1, 75 (1957)). As noted above, there is nothing "impractical or anomalous" about extending to aliens fleeing persecution in Haiti the right to petition the United States Government for asylum—a right that is accorded to similarly situated aliens from other countries. Accordingly, Haitians—like other aliens—are entitled to that right as well as to the other procedural protections which Congress has attached to that right.

CONCLUSION

For the foregoing reasons, as well as those advanced by respondents, the judgment below should be affirmed.

Respectfully submitted,

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